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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MAYHEW PLAZA WOODLAND HILLS
II, LLC,

Plaintiff and Appellant,

v.

WARREN KELSEY,

Defendant and Respondent.

G055668

(Consol. with G055830)

(Super. Ct. No. 30-2016-00858636)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, James L.
Crandall, Judge. Affirmed.

Law Offices of Ernest Mooney and W. Ernest Mooney for Plaintiff and
Appellant.

Law Offices of Edwin Paul, Edwin Paul and Margie L. Jesswein for
Defendant and Respondent Warren H. Kelsey.

INTRODUCTION

Mayhew Plaza Woodland Hills, LLC, sued Hemet West, LP, and Warren Kelsey for several kinds of fraud relating to the purchase of a shopping center in February 2013. Mayhew Plaza's principal, Jeffrey Mayhew, who was the sole trial witness, claimed he had been deceived regarding a credit for certain items of deferred maintenance and regarding the condition of the shopping center's front parking lot. But Mayhew Plaza did not file suit until June 2016. The jury concluded Mayhew Plaza had waited too long.

Mayhew Plaza appealed from posttrial orders denying its motion for judgment notwithstanding the verdict (JNOV) and its motion for new trial. It has also appealed from an order granting Kelsey his attorney fees. Mayhew Plaza subsequently settled with Hemet West and dismissed its appeal as to that respondent, leaving only Kelsey as an adverse party.

We affirm the orders. Substantial evidence supported the jury's verdict, and a JNOV motion can be granted only in the absence of supporting evidence. The trial court did not make the errors Mayhew Plaza had identified to support its motion for a new trial, and the purchase agreement between Mayhew Plaza and Hemet West permitted the court to award Kelsey's attorney fees.

FACTS

On February 7, 2013, Mayhew Plaza and Hemet West entered into a purchase agreement for a 38-year-old shopping center in Hemet. Escrow closed on February 25, an unusually short time. The reason for the rush was that Mayhew wanted to do a 1031 exchange for some recently sold property, and he had to complete the shopping center purchase quickly in order to meet the IRS deadline.¹ Besides having a

¹ Internal Revenue Code section 1031 (section 1031). A section 1031 exchange allows a property owner who has sold a piece of real estate to defer federal taxes on it if he or she buys a similar property within the time limit prescribed by the IRS.

law degree from UCLA, Mayhew had a degree from the London School of Economics and had developed five or six shopping centers between 1999 and 2013 before Mayhew Plaza purchased the Hemet center.

During the time Mayhew Plaza and Hemet West were negotiating, Hemet West's general partner, George Coult, was ill with cancer. He therefore asked his "friend" "and former partner in other shopping centers," Kelsey, "to assist in negotiating the sale." Kelsey "agreed to do so as a friend, for no money, and to communicate all proposals to Hemet West partners, not to bind to Hemet West with any deal points."

Mayhew testified that he began looking at the center with an eye to purchase in September 2012. In December 2012, while he was still contemplating the purchase, one of the real estate brokers told him that Coult was upset about the prospect of having to spend money to fix the front parking lot, and the broker said the buyer was "getting a complete job of a parking lot. Something to that effect. [The buyer is] not going to need a lot of maintenance for a long time." The buyer is "getting a brand new parking lot and won't need maintenance for a long time."

The purchase agreement included some extremely stringent language about the property's condition. The agreement placed the onus of inspection on Mayhew Plaza

and released Hemet West from any responsibility for defects.² Accordingly, before escrow closed, Mayhew had his regular inspector go through the shopping center to look for deferred maintenance items, “something that we normally wouldn’t see.” Mayhew explained that he trusted the inspector because “he just really knew everything about construction” and so could tell what “was going to go wrong and when it would go wrong.” The inspector was to focus “on deferred maintenance across the board, from asphalt to roof to anything else that he might see.” The inspector’s “goal was to try to identify deferred maintenance items. So, the big picture items . . . things that could really affect the cost and ownership of the shopping center.” Mayhew also commissioned a separate inspection of the roof. As a result, he was aware before escrow closed that the roof was in bad shape and that the back parking lot would need repairs. He was also told that only one store in the center had fire sprinklers.

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Paragraph 12 provided, “CONDITION OF PROPERTY: It is understood and agreed that the Property is being sold “as is” that Buyer has or will have prior to the Closing Date, inspected the Property; and that neither Seller nor Agent makes any representation or warranty as to the physical condition or value of the Property or its suitability for Buyer’s intended use. ‘Property Condition’ means each and every matter of concern or relevance to Buyer relating to the Property including without limitation the financial, legal, title, physical, geological and environmental condition and sufficiency of the Property and all improvements and equipment thereon; applicable governmental laws, regulations, and zoning; building codes, and the extent to which the Property complies therewith; the fitness of the Property for Buyer’s contemplated use; the presence of hazardous materials; title matters; and contracts to be assumed by Buyer. [¶] Upon Buyer’s satisfaction or waiver of the contingencies in Paragraph 7.1 – 7.4, Buyer agrees, and represents and warrants that upon Closing, Buyer will purchase the Property ‘as is’ and solely on reliance on its own investigation of the Property. Seller had no obligation to repair, correct or compensate Buyer for any Property Condition, and upon closing, Buyer shall be deemed to have waived any and all objections to the Property Condition, whether or not known to Buyer. Upon Closing, Buyer hereby waives, releases, acquits, and forever discharges Seller, and Seller’s agents, directors, officers, and employees to the maximum extent permitted by law from any and all claims, actions, causes of action, demands, rights, liabilities, damages, losses costs expenses or compensation whatsoever, direct or indirect, known or unknown, foreseen or unforeseen, that it now has or which may arise in the future on account of or in any way growing out of or connected with Property Condition. BUYER EXPRESSLY WAIVES ANY OF ITS RIGHTS GRANTED UNDER CALIFORNIA CIVIL CODE SECTION 1542 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.” Hemet West and Mayhew Plaza separately initialed Paragraph 12.

Paragraph 7.2 of the agreement provided, “PHYSICAL INSPECTION: Buyer shall have twenty (20) calendar days following the Effective Date to inspect the physical condition of the Property, including, but not limited to the soil conditions and the presence or absence of lead-based paint and other hazardous materials on or about the Property, and to notify the Seller in writing that Buyer approves same. If Buyer fails to approve the physical condition of the Property within the specified time, this Agreement shall be null and void, Buyer’s entire deposit shall be returned, and Buyer and Seller shall have no further obligations hereunder.”

Mayhew decided, paragraph 12 notwithstanding, that Mayhew Plaza was entitled to a credit against the purchase price for what he called “deferred maintenance” for the roof, the back parking lot, and the missing fire sprinklers. He broached this subject to Kelsey just before escrow closed. According to Mayhew, Kelsey told him to submit an “intelligent list” of the items for which he wanted credit, and Kelsey would pass the list along to the Hemet West partners. Mayhew also stated that Kelsey said the partners would be “fair.”

On the Friday before the escrow closing date on the following Monday, Mayhew emailed Kelsey about the deferred maintenance. He stated, “Given that these are deferred maintenance items, it will be difficult to pass these costs through to the shop tenants as they will not be able to pay for them. Thus, the costs will be borne by me. [¶] This does not affect my closing the transaction – I am going to close anyway. Thus, it is solely your decision as to how much credit, if any, is fair.”

The real estate brokers, who were representing both buyer and seller, contacted Mayhew shortly after escrow closed because some documents remained to be signed, and the brokers would not be paid until they were. Mayhew responded, “I have signed these and sent them back so you can get paid. The seller [Hemet West] and ourselves still have not agreed on a credit for certain deferred maintenance items. We are waiting for further feedback from the seller and I believe the seller will be fair. However, in the meantime I don’t want to create any implication that we don’t want the credit. Therefore my signatures on these documents do not constitute a waiver of any rights to credits or other offsets/remedies.”

Mayhew sent an email to the brokers the day before escrow closed stating, “We will close anyway, whether or not we receive a credit We know we have to rely on the seller’s goodwill, but we hope he will see our position.”

On July 3, 2013, Mayhew received an email from the attorney who became Kelsey’s trial counsel stating, “[M]y recollection is that no rep’s were made by the seller

re condition of Maintenance [*sic*]. This was an older shopping center, and the presence of some deferred Maintenance was reflected in a reduced purchase price. Also, George [Coul] paid extra to have a notary come to his house 3 times, and for FedEx to deliver doc's to escrow, so you could close in time to take advantage of 1031 & save taxes. Also, you bought the center 'AS IS'. Under these circumstances, I could not recommend a further reduction in the purchase price in the form of a credit for 'deferred Maintenance'." Mayhew claimed this email was the first he knew he would not be getting a credit.

Mayhew Plaza filed suit on June 17, 2016. The first amended complaint, the operative pleading, named Hemet West and Kelsey as defendants. The complaint stated causes of action for fraud and negligent misrepresentation against Hemet West and against Kelsey individually. As to the deferred maintenance credit, Mayhew Plaza alleged that a few days before escrow closed, Mayhew informed Hemet West, through the broker, that he wanted a credit for deferred maintenance on the roof, the back parking lot, and the missing fire sprinklers. Mayhew Plaza alleged that Kelsey promised to deal with the issue after closing, in view of the imminent completion of escrow. Mayhew Plaza alleged that in July 2013, a Hemet West representative told Mayhew no credit would be forthcoming. Mayhew Plaza listed amounts for repair of the front parking lot and the roof and installation of fire sprinklers as its damages for fraud. Mayhew Plaza realleged the same facts and damages in its cause of action for negligent misrepresentations, in addition to the amount necessary to repair the back parking lot.

At the pretrial conference, Hemet West persuaded the trial court to bifurcate the trial to try the limitations defense first. If Mayhew Plaza had not filed suit on time, there would be no need for a trial on the merits.

The case went to trial on the limitations defense before a jury on August 23, 2017. Mayhew was the sole witness. He testified that he had first looked at the shopping center in September 2012. He did not begin negotiations to purchase the center

until late January 2013, by which time the deadline for a section 1031 exchange was looming. He had to close no later than February 25 to get his tax deferral.

When asked why he had not filed suit until June 2016, Mayhew had two explanations.³ Regarding the deferred maintenance credit, he testified “I could have also said ‘I’m closing, but I have a cause of action against you for the credits.’” But he did not because he wanted to be “nice and polite.” He later explained that by “cause of action” he meant “I have an ability to enforce my legal rights.” He also waited because he dislikes litigation: “I don’t like to litigate it if I can avoid it.” “Economically, emotionally, it’s a waste. . . . I just figured, let’s move on, and everything else.”

After two days of testimony, the jury returned a special verdict in favor of both Hemet West and Kelsey. The special verdict consisted of four questions, to each of which the jury unanimously answered “yes.” They were:

- “Is [Mayhew Plaza’s] claim for intentional fraud against Hemet West barred by the statute of limitations?”
- “Is [Mayhew Plaza’s] claim for intentional fraud against [Kelsey] barred by the statute of limitations?”
- “Is [Mayhew Plaza’s] claim for negligent misrepresentation against Hemet West barred by the statute of limitations?”
- “Is [Mayhew Plaza’s] claim for negligent misrepresentation against [Kelsey] barred by the statute of limitations?”

Mayhew Plaza moved for a JNOV and a new trial. The court denied both motions. Kelsey moved for his attorney fees and costs, and the trial court awarded him fees in the amount of \$143,775 and costs in the amount of \$11,438.

³ During opening arguments, Mayhew Plaza’s counsel conceded that Mayhew had been “delinquent on asking for credits on the [back] parking lot.” “He decided not to do anything” because it was not “worth the hassle.”

Mayhew Plaza filed two notices of appeal. The first, filed on November 13, 2017, identified the judgment after jury trial (entered September 14), the order denying the motion for JNOV (entered November 9), and an order granting Hemet West's motion for attorney fees (entered November 9) as the subjects of the first appeal. The second notice of appeal, filed January 4, 2018, identified the amended judgment, the order granting Kelsey's motion for attorney fees, and the order on Mayhew Plaza's motion to tax costs, all entered on January 3, as the subjects of the second appeal. We have consolidated the two appeals for briefing, argument, and decision. As stated above, after Mayhew Plaza dismissed Hemet West, only Kelsey remains as a respondent.

DISCUSSION

On appeal, Mayhew Plaza has identified three legal issues. First, the trial court erred by denying Mayhew Plaza's JNOV motion. Second, the trial court erred in denying Mayhew Plaza's new trial motion, based on improper jury instructions, juror misconduct, and misconduct of counsel. Finally, the trial court erred in awarding attorney fees to Kelsey. Mayhew Plaza appears to be accusing the trial judge of bias as well.

I. The JNOV Motion

Code of Civil Procedure section 629, subdivision (a), provides, "The court, . . . either of its own motion . . . or on motion of a party against whom a verdict has been rendered, shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." "A directed verdict may be granted, when, disregarding conflicting evidence, and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said that there is no evidence of sufficient substantiality to support a verdict in favor of such party, if such a verdict has been rendered." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 358-359 (quoting *Walters v. Bank of America* (1937) 9 Cal.2d 46); see *Trujillo v.*

North County Transit Dist. (1998) 63 Cal.App.4th 280, 284 (*Trujillo*) [JNOV motion denied if substantial evidence supports verdict].)

When we review an appeal from an order denying a JNOV motion, we must determine whether substantial evidence, contradicted or uncontradicted, supports the jury's verdict. If it does, then the court did not err in denying the motion. (*Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 554-555; see *Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 890; *Hirst v. City of Oceanside* (2015) 236 Cal.App.4th 774, 782.)

The verdict the jury rendered was called a special verdict, but this was a misnomer. “[A] special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.” (Code Civ. Proc., § 624.)

Mayhew Plaza sought recovery for two distinct fraud claims, with two distinct timelines. The first was withholding the deferred maintenance credit, a claim Mayhew Plaza contended did not accrue until July 2013. The second was the condition of the front parking lot, an entirely separate deception that Mayhew Plaza contended was not discovered until years later. Accordingly, it was quite possible that the jury could find one fraud claim time-barred while the other was not.

But the verdict did not allow the jury to make this distinction. Instead, the verdict lumped both claims together and asked the jury to make a general decision as to whether the claim for “fraud” or “negligent misrepresentation” was barred by the statute of limitations. A properly structured *special* verdict would have permitted the jury to consider each fraud and negligent misrepresentation claim separately.⁴

⁴ For example, “Did Mr. Mayhew know before June 17, 2013, or should he have known before June 17, 2013, that Mayhew Plaza would not get a credit for deferred maintenance?”

The verdict actually rendered in this case is a general verdict; the jury pronounced generally on all the issues, in favor of the defendants.⁵ In fact, when counsel and the court were discussing the verdict form, Mayhew Plaza’s counsel stated, “I find it satisfactory to use the general verdict. I’ll explain it in closing argument.” This despite his recognition “that parts of the claim might be time barred, and other parts might not. There are different misrepresentations that give rise to the claims.” We conclude Mayhew Plaza assented to the ultimate form of the verdict.

The reason this distinction is important is that the standard of review on appeal is different for general verdicts and special verdicts. “Where several counts or issue are tried, a general verdict will not be disturbed by the appellate court if a single one of such counts or issues is supported by substantial evidence and is unaffected by error, although another is also submitted to the jury without any evidence to support it and with instructions inviting a verdict upon it.’ [Citations.]” (*Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149, 1153; see *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193.) By contrast, when a jury returns a special verdict, we do not imply findings in favor of the prevailing party. (*Trujillo, supra*, 63 Cal.App.4th at p. 285; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959-960.)

Mayhew Plaza represented to the court that it was suing Kelsey only for his part in the deferred-maintenance credit issue. It also admitted it knew as of July 2013 it

According to Mayhew Plaza, the jury was “clearly confused and tired” when in rendered its unanimous defense verdict. Jury selection took place on August 22, and the jury heard a full day of testimony on August 23, a Wednesday. The jury was off until Monday, August 28, and the case went to the jury during the morning session of August 29. The verdict was returned sometime during the afternoon of August 29. There was hardly time for the jury to become tired, and it is highly unlikely that all 12 of them were so thoroughly confused that each of them voted in the defense’s favor four times.

⁵ “A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant[.]” (Code Civ. Proc., § 624.) “Special verdicts should force jurors to *focus their thinking* on the specific issue rather than simply trying to ‘do justice’ or ‘be fair’ (as permitted by use of a general verdict).” (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2018) ¶ 17:18, p. 17-5.)

was not going to get a credit and the limitations period for negligent misrepresentation was two years. Therefore, substantial evidence supported the jury's decision that the limitations period on negligent misrepresentation against Kelsey had expired before Mayhew Plaza filed suit in June 2016.

Likewise, Mayhew testified that he knew when the escrow closed in February 2013 that he had a claim for deferred maintenance, but he chose not to pursue it, because he was being "polite." Based on this evidence, the jury could reasonably have concluded that the claim for fraud against Kelsey was time-barred.

II. The New Trial Motion

On appeal, Mayhew Plaza had identified three grounds of error in the trial court's denial of the new trial motion: erroneous jury instructions, juror misconduct, and misconduct by counsel. (See Code Civ. Proc., § 657, subds. (1) and (2).) On review of an order denying a new trial, an appellate court must review "the entire record, including the evidence, so as to make an independent determination whether the error was prejudicial." [Citations.] (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417, fn. 10.)

A. Jury Instructions

Mayhew Plaza makes two arguments regarding jury instructions. First, the court *should* have given its proposed instruction about the accrual of a cause of action. Second, the court *should not* have given jury instructions regarding the elements of fraud and negligent misrepresentation.

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).) A jury instruction that a court chooses to give must be a correct statement of the law. (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 526.) If an instruction is requested and refused, we view the evidence in the light most favorable to the party proposing it to determine

whether that party was entitled to the instruction. (See *Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1358.)

As with other matters of appellate review, it is not enough to show that a jury instruction is erroneous; it must also be prejudicial. “A judgment may not be reversed for instructional error in a civil case ‘unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’ [Citation.]” (*Soule, supra*, 8 Cal.4th at p. 580.) In other words, the error must have prejudicially affected the verdict. (*Ibid.*) We review the jury instructions as a whole, not individual instructions in isolation. (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.) We review the propriety of jury instructions de novo. (*Ibid.*)

1. Instruction refused

Mayhew Plaza requested the following jury instruction regarding accrual: “Civil actions can be commenced within the period prescribed by the statute of limitations after the cause of action shall have accrued. When damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. Mere threat of future harm, not yet realized, is not enough. Therefore, when the wrongful act does not result in immediate damage, the cause of action does not accrue prior to the maturation of perceptible harm. The mere possibility, or even probability, that an event causing damage will result from a wrongful act does not render the act actionable.”

This instruction was discussed in general on the day before closing arguments. The next day, the court read Mayhew Plaza’s proposed instruction into the record and then commented that the language was so legalistic that the jury would cease paying attention. Jury instructions were supposed to “give the jury the law in an understandable fashion,” as this instruction failed to do. Mayhew Plaza’s counsel then asked for the condensed version: ““When damages are an element of the cause of action,

the cause of action does not accrue until the damages have been sustained.” The court also refused to give the condensed version.

Instead, after considerable argument, the court stated it would give special instruction no. 2⁶ and CACI No. 1925, with the second paragraph requested by Mayhew Plaza. The following instruction was read to the jury: “Hemet West and . . . Kelsey contend that [Mayhew Plaza’s] lawsuit for intentional misrepresentation and false promise was not filed within the time set by law. To succeed on this defense, Hemet West or . . . Kelsey must prove that Mayhew Plaza’s claimed harm occurred before June 17, 2013. [¶] If Hemet West or . . . Kelsey proves that Mayhew Plaza’s claimed harm occurred before June 17, 2013, Mayhew Plaza’s lawsuit was still filed on time if Mayhew Plaza proves that before that date, it did not discover facts constituting the fraud, and with reasonable diligence, could not have discovered those facts.” The court then repeated the instruction substituting negligent misrepresentation for fraud and June 17, 2014, for the relevant date.

During closing argument, Mayhew Plaza repeatedly informed the jury that “you’ll recall when the judge read the elements of intentional misrepresentation and negligent misrepresentation, there has to be harm. Because if you haven’t been harmed, you don’t go running to court. You’ve got to have a loss. Even if you know somebody lied to you, if you haven’t sustained a loss, you’re not going to court. You don’t have a claim yet. Hasn’t developed. Hasn’t ripened.” He argued that Mayhew Plaza had not been harmed as to the deferred-maintenance credit until July 2013, when Mayhew received the final email on the subject.

⁶ Special instruction No. 2 stated, “An action for relief on the grounds of fraud must be brought within three years. The cause of action is not deemed to have accrued until discovery by Mayhew Plaza of the facts constituting the fraud. An action for relief on the ground of negligent misrepresentation must be brought within two years. The cause of action is not deemed to have accrued until the discovery by Mayhew Plaza of the facts constituting the fraud.” This instruction was adapted from Code of Civil Procedure section 388, subdivision (d).

Mayhew Plaza's assignment of error regarding its proposed jury instruction lacks merit for two reasons. First, the instruction was potentially misleading – seriously so. Second, the concept embodied in the instruction was covered by other instructions, and Mayhew Plaza had ample opportunity to argue its take on the law.

Mayhew Plaza's position on this issue throughout trial – reflected not only in the proposed instruction but also in its closing argument – is that a cause of action for fraud or negligent misrepresentation does not accrue until damages have “manifested” themselves and that there was no evidence that the damage with regard to the deferred maintenance credit had manifested itself before July 2013.

Mayhew Plaza's position on appeal is the same, and it is just as incorrect here as it was there. Mayhew Plaza has confused two issues. The first is when a plaintiff is harmed. The second is when a cause of action subject to the discovery rule accrues.⁷

Ordinarily the statute of limitations begins to run “upon the occurrence of the last element essential to the cause of action” (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187) or “once plaintiff has suffered actual and appreciable harm.” (*Davies v. Krasna* (1975) 14 Cal.3d 502, 514, [“neither the speculative nor uncertain character of damages . . . will toll the period of limitation”].)

The elements of a claim for fraud are a false statement of fact, knowledge of falsity, intent to induce reliance, actual and reasonable reliance, and resulting harm. (See *Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498.) In this case, apropos of the deferred-maintenance credit, Mayhew Plaza was harmed when it did not get the credit. This happened when the transaction closed on February 25 and Mayhew Plaza paid the full negotiated price, with no credit.

⁷ The court tried to explain this difference to no avail: “[T]his is just a statute of limitations issue. What you’re talking about, damages, may be a demurrer issue to actually state a cause of action. [¶] When you discover it, you have a cause of action[.] Whether it’s a cause of action that’s enforceable because you have damages is a different story.”

Mayhew Plaza has confused this first issue with the second issue, when the cause of action *accrues*. Under Code of Civil Procedure section 388, subdivision (d), a cause of action for fraud is subject to the discovery rule; this means the cause of action does not *accrue*, even though the plaintiff has been *harmed* (and the limitations period would ordinarily begin to run assuming all other elements were present) until the plaintiff knows or should have known about his injury.

In addition to its unintelligibility, the proposed jury instruction, while correct in essence, had the potential of confusing the jury in the same way Mayhew Plaza was confused, especially given Mayhew Plaza's interpretation as articulated in its closing argument. For example, Mayhew Plaza insisted, incorrectly, that it had no fraud claim with respect to the shopping center's front parking lot until potholes appeared. Because the limitations defense was being tried first, the assumption was that it *had* a fraud claim, that all of the elements, including harm, were present. Thus, Mayhew Plaza was *harmed* when it bought a piece of property with a defective front parking lot. The question before the jury was not whether Mayhew Plaza had a claim but rather whether it knew or should have known it had a claim. Telling the jury that Mayhew Plaza had not been *harmed* until potholes appeared risked deflecting the jury's attention toward the asphalt and away from what Mayhew knew or should have known.

To support its argument, Mayhew Plaza relied and continues to rely on *City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882 (*City of Vista*). In that case, Vista bought securities it later determined were too speculative for its portfolio. It sued the brokers who had sold the securities for fraud, among other causes of action. (*Id.* at pp. 884-886.)

The reviewing court reversed the summary judgment granted to the brokers on limitation grounds because "[w]hen damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained." (*City of Vista, supra*, 84 Cal.App.4th at p. 886.) There was a triable issue of fact as to when Vista had

been damaged, because it was not possible to know whether Vista lost money until the last payment was received. (*Id.* at p. 887.) “‘Mere threat of future harm, not yet realized, is not enough.’ [Citation.]” (*Id.* at p. 886.)

But in *City of Vista*, there was no timing gap between harm and accrual. Given the speculative nature of the investments, Vista could not have been harmed until it sustained a monetary loss. Investments are speculative because no one can reasonably predict how they will turn out. Vista might have made a bundle if the investments had paid off, or broken even, in which case it would not have been harmed at all. Not until the returns were in and it was clear that Vista had lost money could the fraud have harmed Vista.

In this case, however, there was nothing speculative about the state of the front parking lot, at least not according to Mayhew. Nor was there any question that escrow had closed without a deferred-maintenance credit. The harm to Mayhew Plaza was realized, not threatened or in the future.

The jury had evidence that Mayhew knew he had a cause of action regarding deferred maintenance when the transaction closed or shortly thereafter, but chose not to pursue it in the interests of politeness and avoiding “hassle.” This is substantial evidence that Mayhew Plaza’s claims against Kelsey for fraud and negligent misrepresentation were time-barred.

It was also not error to refuse to give Mayhew Plaza’s accrual instruction because it is not error to refuse to give an instruction substantially covered by other instructions. (See *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217.) Special instruction No. 2 and the versions of CACI No. 1925 as read to the jury more than adequately covered the issue, as shown by Mayhew Plaza’s closing argument, which focused in large part on its accrual theory.

Because we find the court did not err in refusing to give Mayhew Plaza’s accrual instruction, it is not necessary to address prejudice.

2. Instructions given

As to the second claimed error – instructing on the elements of fraud and negligent misrepresentation – an inspection of the reporter’s transcript reveals that *Mayhew Plaza’s counsel* asked the court to give these instructions.⁸ We need not discuss this point further other than to refer to the doctrine of invited error. Invited error is ““an ‘application of the estoppel principle’: ‘Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal’ on appeal. [Citation.] . . . At bottom, the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court. [Citations.]. . . .” [Citation.] [¶] It has been said that the invited error doctrine ‘applies “with particular force in the area of jury instructions. . . .” [citation], and numerous cases have held that a party who requests, or acquiesces in, a particular jury instruction cannot appeal the giving of that instruction. [Citations.]’ (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000.)

Mayhew Plaza now argues that it did not have to object to these two instructions because, pursuant to Code of Civil Procedure section 647, the instructions are deemed excepted to. This is a complete misreading of section 647, which deems only instructions given, deleted, or modified *upon ex parte application* excepted to without an objection. Instructions given in the ordinary course “are deemed to have been excepted to” only if the party “makes known his position” when the order is made or “within a reasonable time thereafter.” (Code Civ. Proc., ¶ 647.)

Nor could this code section negate the doctrine of invited error. “If a party affirmatively agrees to an instruction, we do not ignore that fact and deem an objection.”

⁸ “[Mayhew Plaza’s counsel]: Your Honor, I think we should probably give the 1900 instruction and the 1902 and 1903 – fraud, promissory fraud, and negligent misrep – so they [i.e., the jurors] know the elements of the claim. [¶] . . . [¶] I think it slipped through the cracks.

“The Court: How about 1903, ‘negligent misrepresentation?’

“[Counsel]: We should add that.”

(*Ventura v. ABM Industries, Inc.* (2012) 212 Cal.App.4th 258, 271.) In this case, Mayhew Plaza did not just *agree* to giving these instructions; it proposed them.

Mayhew Plaza also argues that it proposed the instructions “under duress.” The record reflects no duress or even reluctance to give these instructions. There is also no suggestion that these instructions were proposed in desperation after the accrual instruction was refused in order to salvage Mayhew Plaza’s position on accrual or to “make the best of a bad situation.” Mayhew Plaza wanted the jurors to “know the elements of the claim.” And these instructions made sure they did.

B. Juror Misconduct

Mayhew Plaza attached a declaration by one of the jurors to its motion for new trial. The declarant made statements regarding other jurors’ perception of the evidence presented at trial and conclusions they had drawn from this evidence. The main point of the posttrial declaration appeared to be that the jurors were actually debating whether Hemet West and Kelsey had defrauded Mayhew Plaza, instead of whether Mayhew Plaza had filed its complaint on time.

To determine whether a party has established juror misconduct, “[t]he trial court must first ‘determine whether the affidavits supporting the motion are admissible. [Citations.]’ This, like any issue of admissibility, we review for abuse of discretion. [Citation.] [¶] Second, ‘If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.]’ [Citation.] . . . On review from a trial court’s ‘determin[ation of] whether misconduct occurred, “[w]e accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.]”’ [Citations.] [¶] “‘Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial.” [Citation.]”’ (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345.) We review the issue of prejudice independently. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

Evidence Code section 1150, subdivision (a), provides: “Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.” Interpreting this code section, our Supreme Court has ruled that “[t]he only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.” (*People v. Hutchinson* (1969) 71 Cal.2d 342, 350 (*Hutchinson*)). The Evidence Code section creates a “distinction between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved” (*id.* at p. 349) and permits only evidence of the former to impeach a jury. (See *People v. Cox* (1991) 53 Cal.3d 618, 694-696 [court is “precluded from considering any matters concerning the jurors’ ratiocinations”], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390; *Akers v. Kelley Co.* (1985) 173 Cal.App.3d 633, 656-657, overruled on other grounds in *People v. Nesler, supra*, 16 Cal.4th 561.)

A juror declaration that purports to establish “‘deliberative error’ in the jury’s collective mental process,” such as “confusion, misunderstanding and misinterpretation of the law,” including regarding the way in which the jury interpreted and applied jury instructions, is inadmissible under Evidence Code section 1150. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1683-1684, quoting *Ford v. Bennacka* (1990) 226 Cal.App.3d 330, 336.)

As the trial court correctly found, the juror declaration submitted by Mayhew Plaza contains only inadmissible hearsay. Thus Mayhew Plaza did not pass the first part of the three-part test for a new trial based on juror misconduct. (See *Burns v.*

20th Century Ins. Co. (1992) 9 Cal.App.4th 1666, 1670-1671 [Evid. Code, § 1150 permits only admissible evidence to impeach verdict].) Moreover, the statements in the declaration referred only to the other jurors' thought processes, which would not be admissible to impeach the verdict in any event. (See *Hutchinson, supra*, 71 Cal.2d at p. 349.) The trial court correctly denied the motion for new trial based on juror misconduct.

C. Attorney Misconduct

Before trial, Mayhew Plaza's counsel expressed his misgivings about trying the limitations defense first. He was concerned that the jurors could be influenced in their decision if they learned that a defense verdict on the limitations issue would mean they would not have to sit through a trial on the case-in-chief. Accordingly, Mayhew Plaza asked the trial court to forbid any suggestion to the jurors that they could go home early if they found for the defense on the limitations issue.

Defense counsel pointed out that juries are routinely told that a trial will be conducted in phases, each phase depending on the one before it. For example, the trial on the amount of punitive damages is usually separated from the trial on the main issues, and the jury is told that a finding of oppression, fraud, or malice will necessitate another session on the amount of damages. Likewise where there is a special verdict, counsel will explain to the jury that a "no" decision on an early question means no more deliberations. The court thought it needed briefing on the issue and ordered counsel not to mention it during voir dire. As far as this record indicates, there was no briefing.

During the rebuttal portion of closing argument, Hemet West's counsel, Mr. Hanley, stated, referring to the special verdict, "You've got four questions. You answer 'yes' on number 1, you answer 'yes' on number 2, if you answer 'yes' on number 3, and you answer 'yes' on number 4[.] I heard four times from counsel for plaintiff that you'd be going to a next phase. You answer 'yes' on those, there is no next phase."

After the jury left to deliberate, Mayhew Plaza's counsel stated, "I want to put an objection on the record with respect to Mr. Hanley's statement about them [i.e.,

the jurors] being able to go home early. I think that's objectionable." The court responded, "You know, I did hear that. But I didn't hear 'go home early.' He was commenting on there's going to be a phase two, and he said, 'If you say "no," there won't be a phase two.' But I previously discussed with counsel that it would be inappropriate to say, 'If you just say "no," you can go home.' Or in this case, say 'yes.' Because it's a defense. But he didn't go that far. But I did – it was close. But I think he stayed within the lines."

Mayhew Plaza now argues that statement, plus another earlier by Kelsey's counsel, prejudiced it because it encouraged the jury to find for the defense so the case would be over. We review a trial court's decision on attorney misconduct for abuse of discretion. (*Garcia v. Rehrig Internat. Inc.* (2002) 99 Cal.App.4th 869, 874.)

Mayhew Plaza objected on the record only to Hemet West's counsel's statement, not to Kelsey's counsel's statement, and did so *after* the jury left, when it was too late to object and to request a curative instruction. (See *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 468, fns. 3, 4.) "It is only in extreme cases that the court, when acting promptly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have." [Citation.] In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice." (*Horn v. Atchison, T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 610.) "[T]he procedure outlined above [i.e., objection and admonishment] is not a meaningless ritual; it has been designed through judicial experience to prevent by timely words of caution the very problem with which we are here concerned." (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 320.)

Moreover, Mayhew Plaza's counsel referred several times to the trial being in phases during closing argument. Hemet West's counsel's subsequent statement responded to these references from Mayhew Plaza's counsel.

In its reply brief, Mayhew Plaza stated, “Although they were repeatedly warned by the trial court and counsel for Mayhew Plaza not to do so, counsel for Hemet West and Kelsey could not resist enticing the jurors to rule in their clients’ favor by each stating at the end of their closing argument rebuttals that the jurors’ duties would be concluded if they decided the statutes of limitations issues in their clients’ favor.” We find no evidence in the record of “repeated warnings” by the court or counsel on this subject. In fact, the phase aspect of the trial was mentioned to the jury during the trial itself once by Mayhew Plaza’s counsel, during opening argument, once by the court, and never by Hemet West or Kelsey.

We see nothing to indicate the trial court abused its discretion in this instance.

III. Attorney Fees

The trial court awarded Kelsey \$143,775 in attorney fees individually, in addition to the fees awarded to Hemet West. The court found that the purchase agreement was intended to benefit Kelsey pursuant to a paragraph stating that the agreement was “binding upon and inure[s] to the benefit of the heirs, successors, agents/representatives and assigns of the parties hereto.” Mayhew Plaza argues that Kelsey was not entitled to attorney fees under the attorney fee clause of the purchase agreement because he was not a party to the agreement, an agent, or a third-party beneficiary.

This is not the first time we have examined the purchase agreement in connection with an award of attorney fees. Coult signed the agreement on Hemet West’s behalf as its general partner, then he died on June 4, 2014. When Mayhew Plaza sued in June 2016, it named Kelsey individually and also as representative of Coult’s estate as a defendant.

Mayhew Plaza dismissed Kelsey in his capacity as the representative of Coult’s estate, and Kelsey moved for his attorney fees. The court awarded him \$9,000 in

fees as a prevailing party under Code of Civil Procedure section 1032, subdivision (a)(4). We reversed, on the grounds that Coult was not a party to the agreement or a third-party beneficiary. His representative was thus not entitled to attorney fees.⁹

Now, therefore, we must first address Mayhew Plaza's argument that the doctrine of law of the case applies to this issue. Our previous opinion dealt with Kelsey's entitlement to attorney fees as the representative of Coult's estate. In other words, the real issue was whether *Coult* would have been entitled to fees had he been dismissed from the case. We had no occasion to deal with Kelsey's right to attorney fees in his individual capacity.

The trial court granted Kelsey's attorney fees based on a paragraph 23 of the purchase agreement: "SUCCESSORS AND ASSIGNS: This Agreement and any addenda thereto shall be binding upon and inure to the benefit of the heirs, successors, agents, representatives and assigns of the parties hereto." We review the legal basis of an attorney fee award (as opposed to the amount) as well as the interpretation of contractual provisions de novo. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751-752.)

The trial court granted Kelsey his fees on the grounds that he was Hemet West's agent. If Kelsey was Hemet West's agent, the attorney fee clause, paragraph 24 of the purchase agreement, "inure[d] to his benefit." We therefore examine the record for evidence of Kelsey's relationship to Hemet West. The burden of proof of the agency relationship is on the party asserting the relationship. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 502-503.)

Agency is either actual or ostensible. (Civ. Code, § 2298.) "An agency is actual when the agent is really employed by the principal." (Civ. Code, § 2299.) "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes

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a third person to believe another to be his agent who is not really employed by him.” (Civ. Code, § 2300.) The purported agent cannot establish the existence of an ostensible agency; the principal’s acts must cause the party dealing with the agent to believe the agency exists. (*Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942, 960.)

“A person does not become the agent of another simply by offering to help or making a suggestion. As the court stated in *Edwards v. Freeman* (1949) 34 Cal.2d 589, 591-592: ‘To permit a finding of agency on this evidence would be, in effect, to hold that one who performs a mere favor for another, without being subject to any legal duty of service and without assenting to any right of control, can be an agent. This is not the law.’” (*Violette v. Shoup* (1993) 16 Cal.App.4th 611, 620.)

Kelsey submitted no admissible evidence in his motion for attorney fees regarding his relationship to Hemet West. The only evidence of his relationship was submitted in a declaration from *his own* counsel, who stated that when Coult became ill, “[h]e asked his friend, Warren Kelsey, and former partner in other shopping centers to assist in negotiating the sale of the Hemet West shopping center. Mr. Kelsey agreed to do so as a friend, for no money, and to communicate all proposals to Hemet West partners, not to bind Hemet West to any deal points.” This statement comports with Mayhew’s trial testimony; when any decisions had to be made, Kelsey told Mayhew he would have to go through Coult or “the partners.”

There is no evidence in the record supporting *Kelsey’s counsel’s* authority to speak for Hemet West and therefore no foundation for his statement regarding Kelsey’s agency for Hemet West. Even stretching a point to admit counsel’s statement, the best that can be said is that it establishes Kelsey as *Coult’s* personal agent at a time when he was ill and unable to attend to the details of the Mayhew Plaza negotiation himself. While Coult, as Hemet West’s general partner, might qualify under paragraph 23 as an agent of a party to the agreement, the attorney fee clause does not extend to the agent of an agent.

There is, however, another basis to support the award of attorney fees to Kelsey as Hemet West's agent. While the court and counsel were discussing jury instructions, the court stated it was going to give CACI No. 3703 and asked Mayhew Plaza's counsel if he objected.¹⁰ He did not. The next day, the court confirmed that it would give CACI No. 3703. Before the jury left to deliberate, the court read the following instruction: "Number 3073. Legal relationship not disputed in this case. [¶] Warren H. Kelsey was the agent of Hemet West. If you find that Warren H. Kelsey was acting within the scope of his agency when the incident occurred, then Hemet West is responsible for any harm caused by Warren H. Kelsey."

Undoubtedly, the court had this instruction, and Mayhew Plaza's acceptance of it, in mind when it stated at the posttrial attorney fee hearing, "[Kelsey is] an agent. The defendant was an agent of the contracting parties, and he was actually sued in that capacity. And that's why if he's sued as an agent under the contract, then he would have a right to both sides of the contract. [¶] . . . [¶] . . . [H]aving heard the trial, it was clear [Mayhew Plaza was] saying Mr. Kelsey was an agent, and they were hoping to get a judgment against him because he was an agent of Hemet West."

Having acquiesced in – if not actually proposed – a jury instruction unequivocally affirming Kelsey's agency status with regard to Hemet West, Mayhew Plaza cannot now be heard to argue Kelsey was *not* Hemet West's agent. "Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same . . . proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.' [Citation.]" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.)

¹⁰ CACI No. 3703 states, "In this case [name of agent] was the [employee/agent/[insert other relationship, e.g., 'partner']] of [name of defendant]. [¶] If you find that [name of agent] was acting within the scope of [his/her] [employment/agency/[insert other relationship]] when the incident occurred, then [name of defendant] is responsible for any harm caused by [name of agent]'s [insert applicable tort theory, e.g., 'negligence']."

Mayhew Plaza argues that Kelsey was not an “agent” under the purchase agreement because the term applied only to the brokers. This is incorrect. The purchase agreement refers to two kinds of agents: Capital-A Agent, a defined term meaning the brokers, and lower-case-a agents, an undefined term. Paragraph 23 includes lower-case-a agents, along with successors, representatives, and assigns. The reference here is to the general meaning of the term, not the specialized, capital-A meaning.

The attorney fee paragraph, paragraph 24, provides, “ATTORNEYS’ FEES: In any litigation, arbitration or other legal proceeding which may arise between any of the parties hereto, including Agent, the prevailing party shall be entitled to recover its costs, including costs of arbitration, and reasonable attorneys’ fees in addition to any other relief to which such party may be entitled.” As part of the purchase agreement, paragraph 24 “inure[s] to the benefit” of the parties’ heirs, successors, [lower-case-a] agents, representatives and assigns.¹¹ Mayhew Plaza at least conceded – if not actively urged – Kelsey’s agency status with Hemet West. The purchase agreement allows him to recover attorney fees.

IV. Judicial Bias

Mayhew Plaza characterized the trial court’s decisions in this case as “extremely unusual,” “patently unfair,” and, most damning of all, “curious.” Mayhew Plaza then engaged in a spot of apophasis,¹² by implying that the judge’s personal relationships with several people tangentially associated with the case caused him to rule in defendants’ favor. “[I]t should be noted that the trial judge had personal relationships with very key participants in this case.” These were a former law partner, who represented Kelsey back when Kelsey was Coult’s estate’s representative, and a former

¹¹ We did not consider the effect of Paragraph 23 on the attorney fee clause in our earlier opinion because the issue had not been raised in the trial court.

¹² Apophasis is a rhetorical device though which the speaker can deny a subject while bringing it up. “Far be it from me to suggest”

law school classmate, who is now Hemet West's receiver. That's pretty flimsy support for an argument of judicial bias.

Impugning the court's integrity in a document filed with the court is an instance of direct contempt. (See *In re Koven* (2005) 134 Cal.App.4th 262, 271; *In re White* (2004) 121 Cal.App.4th 1453, 1477-1478.) So is an unsupported allegation of bias toward a party. (*In re White, supra*, 121 Cal.App.4th at p. 1478.) "Disparaging the trial judge is a tactic that is not taken lightly by a reviewing court." (*In re S.C.* (2006) 138 Cal.App.4th 396, 422.)

We have examined the record with some care, and we see no evidence of bias on the part of the judge. The "evidence" of the judge's bias includes the bifurcation of the trial, an order Mayhew Plaza did not challenge in this court, and the rulings addressed in the opinion above, in addition to requiring Mayhew West to post a bond – an order from which it did not appeal. More evidence of bias was attributed to some supposedly sarcastic remarks made when the jury was not present. The final bit of evidence was the personal relationships.

Since we are affirming the orders, they cannot be evidence of bias but rather of considerable judicial acumen applied to a complex case. Bringing up the judge's personal relationships is a shabby effort to deflect responsibility. And attributing a negative outcome to judicial bias is the ultimate in passing the buck.

DISPOSITION

The orders denying appellant's motion for new trial and motion for judgment notwithstanding the verdict are affirmed. The order granting respondent Kelsey's motion for attorney fees is affirmed. Respondent is to recover his costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.